Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1998

THOMAS C. ROBERTSON, JR.

Petitioner,

v.

ALABAMA DEPARTMENT OF REVENUE

Respondent.

# PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CIVIL APPEALS
# SUPPLEMENTAL APPENDIX

## PETITION FOR CERTIORARI

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| THOMAS C. ROBERTSON, JR.<br>2600 Vaughn Lakes Boulevard,<br>#1514, Montgomery, AL 36117 | § | STATE OF ALABAMA<br>DEPARTMENT OF<br>REVENUE<br>ADMINISTRATIVE |
| Taxpayer, | § | LAW DIVISION |
| v. | § | Docket No. Inc. 95-458 |
| STATE OF ALABAMA<br>DEPARTMENT OF REVENUE | § | |

FINAL ORDER

The Revenue Department assessed income tax against Thomas C. Robertson, Jr. ("Taxpayer") for the years 1992 and 1993. The Taxpayer appealed to the Administrative Law Division, and a hearing was conducted on February 27, 1996. The Taxpayer appeared at the hearing with his authorized representative, Aaron Holden of H & R Block. Assistant Counsel Jeff Patterson represented the Department.

This case involves depreciation recapture. The Taxpayer moved to Alabama in 1991, and subsequently sold three rental houses in Oklahoma which he had purchased in the early 1980s. The specific issue is whether the Taxpayer should

be required, for Alabama income tax purposes, to recapture depreciation on the houses for the years prior to when he moved to Alabama and became subject to Alabama income tax.

The facts are undisputed.

The Taxpayer purchased three rental houses in Oklahoma in the early 1980s. He was living in Texas at the time, but subsequently moved to Hawaii, Missouri, and other states. The Taxpayer depreciated the houses every year for federal income tax purposes. It is not known if he also depreciated the houses for state purposes.

The Taxpayer moved to Alabama in 1991. He subsequently sold the rental houses in 1992 and 1993. For federal tax purposes, he recaptured all of the depreciation that had been claimed on the houses. However, for Alabama tax purposes, he recaptured only that portion of the depreciation he had claimed since moving to Alabama.

The Department reviewed the Taxpayer's returns and

required him to recapture depreciation for Alabama purposes to the same extent as required for federal purposes. The Taxpayer appealed the resulting final assessments to the Administrative Law Division.

This issue has never been addressed in Alabama.

All Alabama taxpayers are allowed a depreciation deduction for income producing property pursuant to Code of Ala. 1975, §40-18-15(a)(8). In computing any gain or loss from the subsequent sale of such property, the taxpayer's basis in the property shall be adjusted for depreciation "to the extent allowed (but not less than the amount allowable) under this chapter . . . ." Code of Ala. 1975, §40-18-6(b)(2). In other words, the taxpayer is required to recapture the depreciation by decreasing his tax basis in the property by the amount of depreciation previously claimed or allowed under Alabama law.

The Taxpayer argues that it would be patently unfair for him to be required to recapture and pay tax in Alabama on

depreciation for which he was not allowed a benefit in Alabama in prior years. The Department counters that Alabama law requires a taxpayer to recapture all depreciation "allowed" or "allowable" in prior years, even if such depreciation was not claimed on an Alabama return. I agree with the Taxpayer.

Section 40-18-6(b)(2) requires recapture of all depreciation allowed or allowable "under this chapter", which is Chapter 18 of Title 40. If a taxpayer is not domiciled in or otherwise subject to Alabama tax in a given year, then obviously depreciation is not allowed under Chapter 18 of Title 40 in that year, in which case the taxpayer is not required to recapture depreciation for that year when the property is subsequently sold.

The intent of the recapture rule is to put a taxpayer in the same position tax-wise as if the depreciation had not been claimed in the first place. Pro-rata depreciation is allowed in each year, but the taxpayer must eventually recapture and in

effect pay tax on the depreciation when the property is disposed of. But under the Department's position, a taxpayer would be required to recapture and pay tax on depreciation in Alabama without ever having benefitted from a depreciation deduction in Alabama in prior years. Such a result would be unfair to the taxpayer, and, importantly, is not required under Alabama law.

The above considered, the final assessments in issue are dismissed.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered April 26, 1996.

BILL THOMPSON
Chief Administrative Law Judge

BT:dr

cc: Jeff Patterson, Esq.
Thomas C. Robertson, Jr.
Kim Herman

**IN THE CIRCUIT COURT**
**FOR MONTGOMERY COUNTY, ALABAMA**

| | | |
|---|---|---|
| **ALABAMA DEPARTMENT OF REVENUE,** | ) | |
| **APPELLANT,** | ) | |
| **v.** | ) | **Case No. CV-96-1435-SH** |
| **THOMAS C. ROBERTSON, JR.** | ) | |
| **APPELLEE.** | ) | |

**ORDER**

This case arises from a dispute between Appellee Thomas C. Robertson, Jr. ("Robertson") and Appellant The Alabama Department of Revenue ("Department") concerning whether depreciation deductions on property, either taken or allowable before the Appellee was a resident of the State of Alabama, have an effect on the tax basis of said property. This case was decided by the Administrative Law Judge ("ALJ") following a hearing on February 27, 1996. Pursuant to the ALJ's Order on April 26, 1996, all assessments entered by the

Department against Robertson were dismissed. Subsequently, the ALJ denied the Department's application for rehearing by its Final Order dated June 28, 1996. The Department appealed to this Court which has fully reviewed the briefs submitted by both parties and the record of the proceedings below.

Based upon consideration of the record of proceedings below, the briefs of the parties, and the applicable law, this Court finds in favor of Appellee Robertson and against the Department on its appeal, thus affirming the Final Orders of the ALJ entered on April 26, 1996 and June 28, 1996, respectively.

This case involved one issue: whether §40-18-6(b)(2) of the Code of Alabama requires Alabama taxpayers to adjust their bases in properties owned in a foreign state for depreciation claimed, allowed, or allowable during periods in which they did not reside in Alabama.

The hearing and exhibits presented revealed the following facts:

Robertson purchased three pieces of rental property in Oklahoma when he was living in that State during the early 1980's. Robertson claimed depreciation on the rental properties on his federal income tax returns each year until such time as the properties were sold. Robertson also claimed depreciation on the rental properties on his Oklahoma income tax returns.

After leaving Oklahoma, Robertson lived in Hawaii, Missouri, and Texas. Robertson does not recall whether he claimed depreciation on the rental properties during the periods when he resided in Hawaii and Missouri. Texas did not impose income tax on individuals during the time when Robertson was a resident of that state.

Robertson moved to Alabama in 1991. He sold the Oklahoma rental properties in 1992 and 1993. On his 1992 and 1993 Alabama income tax returns, Robertson adjusted his basis in the rental properties for the amount of depreciation claimed during the period of his residency in Alabama. Alabama

Department of Revenue Examiner John R. Davis, who audited Robertson's 1992 and 1993 income tax returns, recomputed Robertson's basis in the rental properties to reflect the depreciation claimed by Robertson prior to the date he moved to Alabama. Based on Mr. Davis' calculations, the Department entered final assessments of individual income tax against Robertson for the tax years 1992 and 1993 in the amounts of $972.94 and $2013.19, respectively.

Following Robertson's appeal to the Department's assessment to the ALJ, all assessments entered by the Department against Robertson were dismissed. Similarly, the ALJ denied the Department's application for rehearing.

Section 40-18-6(b)(2) of the Alabama Code provides that for purposes of determining the gain or loss from the sale or disposition of property, an adjustment shall be made "for exhaustion, wear and tear, obsolescence, amortization and depletion, to the extent allowed (but not less than the amount

allowable) under this chapter of [sic] prior income tax laws." The Department asserts that this statutory provision requires an adjustment for the aggregate depreciation allowed with respect to an item of property, regardless of the fact that a taxpayer was not a resident of Alabama when such depreciation deductions were available to be taken.

This Court rejects the argument presented by the Department and hereby adopts the position asserted by Robertson that §40-18-6(b)(2) of the Alabama Code does not require Alabama taxpayers to adjust their bases in properties owned in foreign states for depreciation claimed or allowable during periods in which the taxpayers did not reside in Alabama. Furthermore, this Court finds that the determinations of the Administrative Law Judge fully comport with the provisions of Chapter 18, Title 40 of the Code of Alabama, the Alabama income tax statutes.

The Alabama Code is clear: only those individuals who

reside in Alabama, who are domiciled in Alabama, and who are presumed to be residing in Alabama because they maintain permanent places of abode in the State where they spend more than seven months of each year are subject to the income tax provisions in question. §40-18-2, Alabama Code. Appellee Robertson did not maintain a residence, domicile, or permanent place of abode in Alabama before 1991. Therefore, the income tax laws of Alabama are per se inapplicable to Robertson for all years prior to 1991. Furthermore, Robertson neither took nor was eligible for depreciation deductions under the statutory provisions of Alabama. Since the income tax laws of the State did not apply to Robertson, and since Robertson neither took nor was eligible for an Alabama income tax depreciation deduction, no basis adjustment is required under §40-18-6(b)(2) for any year before 1991.

That Robertson is not required to adjust his basis is supported by the longstanding rule that tax statutes are to be

strictly construed against the taxing power and interpreted favorably to the taxpayer. Ex Parte Zewen Marine Supply, Inc., 477 So. 2d 417 (Ala. 1985); Eagerton v. Terra Resources, Inc., 426 So. 2d 807 (Ala. 1983); Misener Marine Construction, Inc. v. Eagerton, 423 So. 2d 161 (Ala. 1982). The Department's interpretation of §40-18-6(b)(2) seeks to expand the language and scope of that statute. The Alabama courts have consistently rejected such attempts in accordance with the rules governing construction of tax statutes. *See, e.g.*, State v. Crenshaw, 287 Ala. 139 (Ala. 1971).

The Administrative Law Judge correctly determined that §40-18-6(b)(2) of the Code of Alabama does not require an adjustment to basis for depreciation claimed or allowable before a taxpayer became a resident of Alabama and subject to the Alabama income tax laws. Therefore, it is hereby ordered, adjudged and decreed that judgment be entered in favor of Appellee Thomas C. Robertson, Jr. and against Appellant The

Alabama Department of Revenue.

DONE this the 20 day of August, 1997.

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Circuit Judge

Jeff Patterson, Esq.
William B. Sellers, Esq.

**ALABAMA COURT OF CIVIL APPEALS**

October Term, 1997-98

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2961367

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State Department of Revenue

v.

Thomas C. Robertson, Jr.

Appeal from Montgomery Circuit Court

(CV-96-1435)

ROBERTSON, Presiding Judge.

This case involves an issue of first impression in Alabama and the interpretation of § 40-18-6(b)(2), Ala. Code 1975.

In the early 1980's, Thomas C. Robertson, Jr., purchased three pieces of rental property located in Oklahoma. He was a resident of Oklahoma at the time, but later moved to Hawaii, then to Missouri, and later to Texas. He became an Alabama resident in 1991. Robertson sold the rental property in 1992 and

1993.

Robertson claimed deductions on his federal income tax returns for depreciation of the rental property each year from the time it was purchased until it was sold. He also claimed depreciation deductions on his Oklahoma income tax returns while he was an Oklahoma resident; however, he stated that he did not remember whether he claimed depreciation deductions when he lived in Hawaii or Missouri. Robertson did not claim depreciation deductions on the property while he lived in Texas because Texas did not impose state income tax during that time. After moving to Alabama, Robertson claimed depreciation deductions on the property on his Alabama income tax returns. When Robertson sold the rental property in 1992 and 1993, he reported as income for those years the gain that he realized from the sale of the property. He calculated that gain for state income tax purposes by using an adjusted basis that reflected only the amount of depreciation he had claimed on his Alabama tax

returns.

The Stat Department of Revenue ("the Department") audited Robertson's 1992 and 1993 Alabama income tax returns. The revenue examiner recomputed Robertson's adjusted basis in the rental property to reflect the total amount of depreciation that the Department contended could have been deducted on the property. That calculation resulted in a reduced adjusted basis in the property and in an increased taxable gain. The Department then entered final assessments of $972.94 for the 1992 tax year and $2,012.19 for the 1993 tax year, representing additional income tax due plus penalties and interest.

Robertson appealed to the Department's Administrative Law Division. After a hearing, the administrative law judge ("ALJ") entered an order in favor of Robertson, dismissing the final assessments. After the ALJ denied the Department's application for a rehearing, the Department appealed the ALJ's

decision to the circuit court. The parties agreed to submit the case on briefs and on the record of the administrative agency proceedings. The trial court affirmed the ALJ's decision in favor of Robertson, and the Department appealed to this court.

Because the facts in this case are undisputed, the ore tenus rule is not applicable. Allen v. Briscoe, 628 So. 2d 756 (Ala. Civ. App. 1993). When the facts before the trial court are undisputed and the controversy involves the consideration of a question of law, no presumption of correctness is accorded to the trial court's judgment, and our review is de novo. Allstate Ins. Co. v. Skelton, 675 So. 2d 377 (Ala. 1996). Moreover, when this court is construing statutory provisions, we do not attach any presumption of correctness to the trial court's construction thereof. Pilgrim v. Gregory, 594 So. 2d 114 (Ala. Civ. App. 1991).

Under Alabama law, when property is purchased, it has, for tax purposes, a "basis" equal to the purchase price. § 40-18-

6(a), Ala. Code 1975. When the property is sold, the taxpayer's "gain" or "loss" realized on the property is computed by subtracting the taxpayer's basis in the property from the sales price; if the property is depreciable, the taxpayer's basis in the property is adjusted pursuant to § 40-18-6(b). § 40-18-7(a), Ala. Code 1975.

Section 40-18-6(b) states, in pertinent part:

> "The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided. Proper adjustment in respect of the property shall in all cases be made:
>
> "....
>
> "(2) in respect of any period since January 1, 1935, for exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent allowed, but not less than the amount allowable, under this chapter."

(Emphasis added.)

The Department contends that the trial court erred in concluding that § 40-18-6(b)(2) did not require Robertson to decrease his adjusted basis in the rental property to account for depreciation deductions that were allowable for those years that he was not a resident of Alabama. In contrast, Robertson argues that the "not less than the amount allowable" language of § 40-18-6(b) limits any adjustments to his basis to those depreciation deductions that he claimed on his Alabama tax returns. Robertson asserts that because he was not subject to Alabama tax laws until1991, no state income tax deductions were "allowable" on his property before then.

We note that the paramount rule of statutory construction is to ascertain the intent of the legislature.

> "When this court is called upon to construe a statute, the cardinal rule is to determine the intent of the legislature. Hamilton v. Walker County, 521 So. 2d 34 (Ala. Civ. App. 1987). This intent may be determined upon examination of the entire statute in light of its general purpose. Id. It has been previously held that when this court is construing a statute,

> it must apply the 'natural, plain, ordinary, and commonly understood meaning' to the words used in the statute. Daniels v. Bowers, 518 So. 2d 736, 738 (Ala. Civ. App. 1987)."

BPH Inc. v. Cochrane, 628 So. 2d 911, 913 (Ala. Civ. App. 1993).

Because the legislature modeled § 40-18-6(b) after the Internal Revenue Code, Alabama courts may look to federal statutory and case construction as persuasive authority. State Dep't of Revenue v. McLemore, 540 So. 2d 754 (Ala. Civ. App. 1988). The federal courts have interpreted "allowable" depreciation to include depreciation deductions for years during which the taxpayer was not a United States citizen. Gutwirth v. Commissioner, 40 T.C. 666 (1963); Abraham v. Commissioner, 9 T.C. 222 (1947). In Gutwirth and Abraham, the taxpayers' adjusted bases in foreign properties were decreased to take into account depreciation deductions that were "allowable" on that property before the taxpayers became United States citizens. Therefore, when the taxpayers later sold their foreign properties

after becoming United States citizens, their adjusted bases in the properties, for federal income tax purposes, were reduced to take into account depreciation deductions that had accrued before the taxpayers became citizens. Gutwirth, 40 T.C. at 678-79; Abraham, 9 T.C. at 227.

In view of the federal authorities and examining § 40-18-6 in light of its general purpose, we conclude that the plain intent of the legislature in enacting § 40-18-6(b) is that a taxpayer must decrease his or her adjusted basis for all depreciation allowable, whether or not taken while residing in Alabama. The statutory language of § 40-18-6(b) - - "to the extent allowed, but not less than the amount allowable under this chapter" - - does not mandate that a taxpayer reside in Alabama for depreciation deductions to accrue for the purpose of his or her Alabama income tax.[1] That statutory language

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[1] We note that, to the extent that a taxpayer utilizes the same methods of depreciation for state and federal taxation purposes, this procedure would result in the same adjusted

merely defines the amount that a taxpayer's adjusted basis must be reduced to take into account depreciation deductions that must be taken on property, "whenever acquired" and "in all cases," regardless of whether the taxpayer was residing in Alabama when those deductions accrued.

If this court were to adopt Robertson's interpretation of § 40-18-6(b), the result could be a detriment to Alabama's taxation system. Such an interpretation would allow a taxpayer to fully depreciate property in another state, move to Alabama and fully depreciate the property again, or sell the property and incur no taxable gain, or possibly a taxable loss, for the purposes of his or her state income tax liability. In contrast, the taxpayer would incur a taxable gain on the property for the purposes of his or her federal income tax. We do not believe that the legislature intended such a result.

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basis for the depreciable property under both federal and state law.

We conclude that the trial court erred in finding that § 40-18-6(b) did not require Robertson to decrease his adjusted basis to account for depreciation deductions that were allowable for those years that he was not a resident of Alabama.

Accordingly, the judgment is reversed and the cause is remanded for the trial court to reinstate the Department's final assessments for the 1992 and 1993 tax years.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Yates, Monroe, and Thompson, JJ., concur.

Crawley, J., dissents.

CRAWLEY, Judge, dissenting.

I dissent. Clearly, a deduction for depreciation was not allowable to the taxpayer before he became a citizen of the State of Alabama and then, for the first time, could file an Alabama state tax return.

Even if the taxpayer's interpretation creates a tax

loophole, that would be insufficient to tilt the clear meaning of the statute.

"The Taxpayer's Right
to Reduce Tax Liability"

> "In these days when, through nation-wide agitation, there is constant talk of 'tax loop-holes' (to which counsel for the Government referred during the oral argument), it is well to point to the fact that the Supreme Court of the United States ever since the question came before it in [United States v. Isham, 84 U.S. (17 Wall.) 496 (1874),] has insisted that a taxpayer may legally and honorably take means to minimize his tax. . . .
>
> "The principle has been reaffirmed repeatedly by the Supreme Court and by the Court of Appeals. In [Gregory v. Helvering, 293 U.S. 465, 469 (1935)], the Supreme Court, in 1935 , epitomized the principle in a sentence which has been quoted approvingly ever since: 'The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted.'
>
> "Despite the fact that in these cases, it is constantly urged that the motive to avoid taxation is important, the fact remains that, as Judge Learned Hand . . . stated [in Chisholm v. Commissioner, 79 F.2d 14, 15 (2d Cir. 1935),]

> the Supreme Court 'has never, so far as we can find, made that purpose the basis of liability.'"

Herbert v. Riddell, 103 F. Supp. 369, 372-73 (S.D. Cal. 1952)

(footnotes omitted).

IN THE SUPREME COURT OF ALABAMA
April 16, 1999

1971841

Ex parte Thomas C. Robertson, Jr. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: State Department of Revenue v. Thomas C. Robertson, Jr.) (2961367) (Montgomery Cir. Ct. No.: CV-96-1435)

CERTIFICATE OF JUDGMENT
Writ Denied

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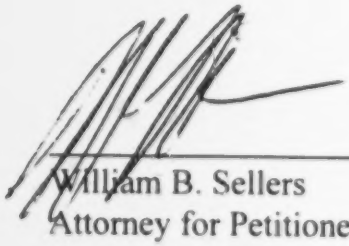
The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied. NO OPINION.

SEE, J. - Hooper, C.J., and Maddox, Kennedy, and Brown, JJ., concur.

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent via regular U.S. mail, first class postage prepaid and properly addressed to **Jeff Patterson, Esq., Assistant Attorney General, Alabama Department of Revenue, Post Office Box 320001, Montgomery, Alabama 36132-0001** on the 22nd day of July, 1999.



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